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 20 U.S. SMALL BUSINESS ADMINISTRATION,  
 21 as Receiver for PROSPERO VENTURES, L.P.

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 UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

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 30 U.S. SMALL BUSINESS  
 31 ADMINISTRATION, as Receiver for  
 32 PROSPERO VENTURES, L.P.,

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 34 Plaintiff,

35 v.

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 37 HIGH GROWTH MANAGEMENT, LTD.,

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 39 Defendant.

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 41 NO. C 07-03735 MEJ  
 42 Related Cases  
 43 No. C 07-3732 MEJ  
 44 No. C 07-3733 MEJ  
 45 No. C 07-3736 MEJ  
 46 No. C 07-3737 MEJ  
 47 No. C 07-3738 MEJ  
 48 No. C 07-3739 MEJ  
 49 No. C 07-3740 MEJ  
 50 No. C 07-3741 MEJ

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1 ("RECEIVER") for PROSPERO VENTURES, L.P., a California Corporation (hereinafter  
 2 "PROSPERO") f/k/a Dotcom Ventures, L.P., hereby submits the following Memorandum of Points  
 3 and Authorities in support of its Application for Default Judgment against Defendant HIGH  
 4 GROWTH MANAGEMENT, LTD, a foreign corporation (hereinafter "HIGH GROWTH"), under  
 5 Rule 55(b)(1) of the Federal Rules of Civil Procedure.

#### 6 PROCEDURAL HISTORY

7 On or about October 20, 2004, SBA was appointed as the Receiver of PROSPERO by way  
 8 of a "Receivership Order." (See Stern Dec. ¶ 5 and Exh. "A" attached thereto.) On or about April  
 9 13, 2007, this Court entered its order ("Lift Stay Order") lifting the judicial injunction and stay  
 10 against the commencement of civil legal proceedings of any nature involving PROSPERO (See Stern  
 11 Dec. ¶ 6 and Exh. "B" attached thereto.)

12 After the stay was lifted, PROSPERO, on behalf and acting in the place of the General  
 13 Partner, filed its complaint with this Court on July 19, 2007. On or about August 29, 2007, HIGH  
 14 GROWTH was served with the summons and complaint. HIGH GROWTH's response was due on  
 15 or about September 18, 2007. October 12, 2007, Plaintiff filed its request for default. On October  
 16 18, 2007, this court granted Plaintiff's request that default be entered against HIGH GROWTH.

#### 17 STATEMENT OF FACTS

18 This is an action for breach of a partnership agreement entitled Amended and Restated  
 19 Agreement of Limited Partnership for Dotcom Ventures, L.P. (Formerly ASCII Ventures, L.P.), A  
 20 California Limited Partnership (hereinafter "PARTNERSHIP AGREEMENT"). (See Stern Dec.,  
 21 ¶ 11.) The dispute stems from HIGH GROWTH's failure to make promised capital contributions  
 22 despite demand.

23 On or about April 1, 1999, PROSPERO and HIGH GROWTH entered into a written  
 24 partnership agreement. (See Stern Dec., ¶ 11.) The agreement was subsequently modified on or  
 25 about September 10, 1999, in a document entitled "Amended & Restated Agreement of Limited  
 26 Partnership for Dotcom Ventures, L.P. (formerly ASCII Ventures, L.P.) a California Limited  
 27 Partnership (hereinafter "PARTNERSHIP AGREEMENT." (See Stern Dec., ¶ 11; a true and correct  
 28 copy of the PARTNERSHIP AGREEMENT is attached to the Stern Declaration as Exhibit "D.")

1 The PARTNERSHIP AGREEMENT was entered by Amy L.K. Lo of HIGH GROWTH. (See Stern  
 2 Dec., ¶ 12; a true and correct copy of the signatory is attached thereto as Exhibit "E.")

3 The PARTNERSHIP AGREEMENT provides, in pertinent part, that "A Partner's Capital  
 4 Commitment shall mean the amount that such Partner has agreed to contribute to the capital of the  
 5 Partnership as set forth opposite such Partner's name on Exhibit A hereto." A true and correct copy  
 6 of the PARTNERSHIP AGREEMENT is attached to the complaint filed in this case as Exhibit "A."  
 7 Exhibit A as attached to the Complaint file in this Court demonstrates that HIGH GROWTH agreed  
 8 to contribute \$124,752 to the partnership. (See Exhibit "A" to Complaint.)

9 HIGH GROWTH paid \$62,376 which is only one-half of the requisite contribution. (Stern  
 10 Dec., 14-15.) On or about May 9, 2005, Plaintiff made formal demand that HIGH GROWTH make  
 11 its unfunded capital contribution no later than June 17, 2005. (See Stern Dec., ¶ 17 and Exh. "G"  
 12 attached thereto.)

13 HIGH GROWTH failed to pay despite demand and notwithstanding its agreement to do so.  
 14 (See Stern Dec., ¶ 18.)

15 Because of HIGH GROWTH's default, PROSPERO therefore applies for judgment in the  
 16 amount of \$62,376, plus attorneys' fees, cost and the interest rate of nine percent (9%) per annum  
 17 beginning on June 17, 2005 and continuing until November 15, 2007. Thereafter, Plaintiff seeks  
 18 interest at the legal rate of 10% per annum.

## 19 DISCUSSION

### 20 1. JUDGMENT IN FAVOR OF PLAINTIFF MAY BE ENTERED UPON 21 DECLARATION

22 Federal Rule of Civil Procedure Rule 55(b)(1), provides:

23 "(b) Judgment. Judgment by default may be entered as follows:

24 (1) By the Clerk. When the plaintiffs claim against a  
 25 defendant is for a sum certain or for a sum which  
 26 can by computation be made certain, *the clerk upon  
 27 request of the plaintiff and upon affidavit of the  
 amount due shall enter judgment for that amount  
 and costs against the defendant*, if the defendant  
 28 has been defaulted for failure to appear and is not an  
 infant or incompetent person." (Emphasis added.)

1 PROSPERO submits that the accompanying declaration of Brian Stern supports its claim  
 2 for breach of partnership. As such, by virtue of Federal Rule of Civil Procedure Rule 55,  
 3 judgment should be entered on the attached declaration in lieu of personal testimony.

4 **2. DEFAULT ADMITS THE MATERIAL ALLEGATIONS OF A COMPLAINT**

5 By defaulting, HIGH GROWTH is deemed to admit the material allegations of the  
 6 complaint, except those relating to the amount of damages. (See *TeleVideo Systems, Inc. v.*  
 7 *Heidenthal* (9<sup>TH</sup> Cir. 1987) 826 F.2d 915, 917.) The Defendant, by its default, admits the  
 8 Plaintiffs well-pleaded allegations of facts and is barred from contesting on appeal the facts thus  
 9 established. (See *Nishimatsu Construction Co., Ltd. v. Houston Nat'l Bank* (5th Cir. 1975) 515  
 10 F.2d 1200, 1206.)

11 In this action, HIGH GROWTH failed to timely respond to the complaint which was  
 12 served on August 29, 2007. By virtue of its default, HIGH GROWTH has admitted all the  
 13 material allegations of the complaint. All PROSPERO needs prove is the amount of its damages.

14 **3. PLAINTIFF HAS PROVEN ITS CLAIM FOR BREACH OF  
 15 PARTNERSHIP AGREEMENT**

16 Federal Courts in diversity cases apply state rules governing interpretation of contracts.  
 17 (See *State of New York v. Blank* 27 F3d 783, 788 (2nd Cir. 1994)). In order for Plaintiff to  
 18 prevail on its claim for breach of contract, it must establish that: (1) a contract was entered into;  
 19 (2) Plaintiff's performance or excuse for nonperformance; (3) Defendant's breach of the  
 20 Agreement; and, (4) damage to Plaintiff as a result of the breach of contract. (See 4 Witkin, Cal.  
 21 Procedure (4th ed., 1997), Plead, § 476, p. 570.)

22 The complaint alleges as follows:

23 1. A contract was entered into: On September 10, 1999, PROSPERO and HIGH  
 24 GROWTH entered into the PARTNERSHIP AGREEMENT, wherein HIGH GROWTH agreed  
 25 to make a capital contribution of \$124,752. (See Stern Dec., ¶ 11, Ex. "A" to Complaint.)

26 2. PROSPERO's performance: The Receiver for PROSPERO has properly notified  
 27 HIGH GROWTH that it has taken control and has made proper written demand that HIGH  
 28 GROWTH make its requisite capital contribution on May 9, 2007, by giving HIGH GROWTH

until June 17, 2007, to make its payment. (Stern Dec., ¶ 17 and Exhibit "G" attached thereto.)

3. HIGH GROWTH's breach: HIGH GROWTH breached the PARTNERSHIP AGREEMENT by failing to pay PROSPERO its portion of the capital contribution. (See Stern Dec., ¶ 18.)

4. Damages: PROSPERO has been damaged in the sum of \$62,376, exclusive of interest for monies due under the PARTNERSHIP AGREEMENT. (See Stern Dec. ¶ 15.)

By virtue of the above, PROSPERO submits that it has established its claim for breach of contract and that judgment in the sum of \$62,376, plus interest, costs, and attorneys' fees should be entered.

4. IN ADDITION TO THE PRINCIPAL SET FORTH ABOVE, PLAINTIFF IS  
ENTITLED TO INTEREST, COSTS AND ATTORNEYS' FEES

## A. Costs

Paragraph 5.7 of the PARTNERSHIP AGREEMENT attached to the complaint filed previously with this court as Exhibit "A" entitles Plaintiff to recover its Costs. To date, Plaintiff has the following costs in bringing this action the following:

a. Filing Fee \$350.00

b. Service of process \$59.50

c. Outside copying Service \$87.24

**Total Costs:** **\$ 496.74**

(See Levin Dec., ¶ 22-27.)

**B. Attorneys' fees:** \$3,477.64

In addition to the above, PROSPERO is entitled to attorneys' fees pursuant to the PARTNERSHIP AGREEMENT. (See Exhibit "A" attached to the complaint filed in this case.) Paragraph 5.7 of the PARTNERSHIP AGREEMENT entitled Failure to Contribute Capital explains: "If any legal proceedings relating to the failure of a Limited Partner to make such contribution are commenced, such Limited Partner *shall pay all costs and expenses* incurred by the Partnership, *including attorneys' fees*, in connection with such proceedings." (Emphasis added.)

1       In this matter, suit was filed against nine (9) limited partners, one of which is HIGH  
2 GROWTH. (Levin Dec. ¶ 23.) Attorneys' fees for matters that were only performed once are  
3 accounted for and divided by nine. Examples of this would be the drafting of the administrative  
4 motion to consider the cases related or reading the Partnership Agreement. Plaintiff is not  
5 seeking to recover these same attorneys' fees from another defendant. (Levin Dec., ¶¶ 24-25) For  
6 tasks that must be performed for each individual defendant such as the drafting of the Complaint  
7 and drafting of the Request for Default, counsel took track of the time it took to complete all of  
8 the documents and then divided the time by the number of the defendants in order to be fair to  
9 each defendant. This is due to the fact that the first complaint drafted was more time consuming  
10 than the last. (Levin Dec., ¶ 25.)

11       **C.     Interest:**

12       The PARTNERSHIP AGREEMENT has a provision for interest at a rate of prime plus  
13 four at the Bank of America's published rate which was nine percent (9 %) per annum at the  
14 pertinent time. (Stern Dec., ¶ 19.) Accordingly, PROSPERO now seeks judgment of the  
15 principal amount of \$62,376; interest at the rate of 9% per annum from June 17, 2005 through  
16 November 15, 2007, in the amount of \$13,550.12, and interest at the daily rate of \$15.38 each  
17 day after November 15, 2007, until the entry of judgment.

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1 **CONCLUSION**

2 The SBA as Receiver for PROSPERO respectfully requests that judgment be entered against  
3 Defendant HIGH GROWTH in the principal amount of \$62,376; interest at the rate of 9% per annum  
4 from June 17, 2005 through November 15, 2007, in the amount of \$13,550.12, and at a daily rate of  
5 \$15.38 thereafter; costs in the amount of \$496.74, and attorneys' fees in the amount of \$3,477.64,  
6 for a total judgment of \$79,900.50 plus interest commencing November 16, 2007.

7 Respectfully submitted,

8  
9 Dated: December 11, 2007

COLEMAN & HOROWITT, LLP

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11 By S/ Christine J. Levin  
12 CHRISTINE J. LEVIN  
13 Attorneys for Plaintiff  
14 U.S. SMALL BUSINESS  
ADMINISTRATION, as Receiver  
for PROSPERO VENTURES, L.P.

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1 **PROOF OF SERVICE**

2 I declare that I am a resident of the County of Fresno. I am over the age of eighteen (18)  
 3 years and not a party to the within action. My business address is 499 West Shaw, Suite 116, Fresno,  
 California 93704.

4 On December <sup>12</sup>, 2007, I served the foregoing document described as **MEMORANDUM**  
 5 **OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR JUDGMENT**  
**PURSUANT TO FRCP RULE 55(b)(1)** on the interested parties, addressed as follows:

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7 [x] **BY MAIL** - by placing [x] a true and correct copy  the original thereof enclosed in a sealed  
 8 envelope with postage thereon fully prepaid in the firm's outgoing mail. I am "readily  
 9 familiar" with the firm's practice of collecting and processing correspondence for mailing.  
 It is deposited with United States Postal Service on that same day in the ordinary course of  
 business.

10  **BY CALIFORNIA OVERNIGHT** - by placing  a true and correct copy  the original  
 11 thereof enclosed in a sealed envelope for delivery via California Overnight next day delivery  
 to the addressee noted above.

12  **BY HAND DELIVERY** - by delivering by hand and leaving a true copy with the person and  
 13 at the address shown above.

14  **BY FACSIMILE TRANSMISSION** - by causing a true facsimile thereof to be electronically  
 15 transmitted to the parties, by using their facsimile number indicated below.

16 Facsimile No.

17  **STATE**: I declare under penalty of perjury under the laws of the State of California that the  
 foregoing is true and correct.

18 [x] **FEDERAL**: I declare that I am employed in the office of a member of the bar of this court  
 19 at whose direction service was made.

20 Executed on December <sup>12</sup>, 2007, at Fresno, California.

21   
 22 Lisa R. Barr

1 **Via U.S. Mail**

2 Jerald P. Shaevitz  
3 24175 Dawnridge Dr.  
Los Altos Hills, CA 94024

4 Agent for Defendants,  
5 High Growth Management, Ltd.

6 **Via California Overnight:**

7 **Chambers Copies**

8 Hon. Maria-Elena James  
9 U.S. District Court, Northern District  
10 450 Golden Gate Avenue  
16<sup>th</sup> Floor, #1111  
San Francisco, CA 94102

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